Supreme Court, U.S.
FILED
AUG 3 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 79-181

~~PATRICIA ROBERTS HARRIS, Secretary of the Department of Housing and Urban Development,~~ THE CITY OF NEW YORK ~~and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.~~,

Petitioner~~s~~,

-against-

ROLAND N. KARLEN, ALVIN C. HUDGENS and CONTINUE,

Respondents.

PETITION OF THE CITY OF NEW YORK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN G. SCHWARTZ,
Corporation Counsel for
The City of New York,
100 Church Street
New York, New York 10007

L. KEVIN SHERIDAN,
LEONARD KOERNER,
CAROLYN E. DEMAREST,

of Counsel.

INDEX

Page

Opinions Below..... 2

Jurisdiction..... 3

Questions Presented..... 4

Statement of the Case..... 5

Reasons for Granting the Writ..... 18

1. THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT..... 20

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF NEPA..... 27

Conclusion..... 35

Appendix..... 36

Cases Cited

Commonwealth of Massachusetts v. Andrus, 594 F. 2d 872 (1st Cir., 1979)..... 30

Page

County of Suffolk v. Secretary of the Interior, 562 F. 2d 1368 (2d Cir., 1977), cert. den., 434 U.S. 1064 (1978)..... 27,28,29

Kleppe v. Sierra Club, 427 U.S. 390 (1976)..... 22,23,30

Matsumoto v. Brinegar, 568 F. 2d 1289 (9th Cir., 1978)..... 31,32

National Helium Corp. v. Morton, 486 F. 2d 995 (10th Cir., 1973)..... 32

New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Commission, 582 F. 2d 87 (1st Cir., 1978)..... 30

Sierra Club v. Adams, 578 F. 2d 389 (D.C. Cir., 1978)..... 32

State of Alaska v. Andrus, 580 F. 2d 465 (D.C. Cir.), vacated in part and remanded sub nom Western Oil & Gas Assoc. v. Alaska, 58 L. Ed. 2d 315 (1978)... 33

Trinity Episcopal School Corporation v. Romney, 387 F. Supp. 1044 (S.D.N.Y., 1974)..... 3

Trinity Episcopal School Corporation v. Romney, 523 F. 2d 88 (2d Cir., 1975)..... 3, 28

	Page
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519 (1978).....	21,22 23,24 25
Warm Springs Dam Task Force v. Gribble, 565 F. 2d 549 (9th Cir., 1977).....	32

Statutes and Rules

Administrative Procedure Act, 5 U.S.C. §706.....	21,22, 30
28 U.S.C. §1254(1).....	4
National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321 et seq.....	4,9, 10,13, 14
24 C.F.R., Part 200, Subpart N....	6
F.R.C.P. 60(b).....	14
N.Y. Environmental Conservation Law, Art. 8, §§8-0101 et seq.....	11,14
N.Y. Public Housing Law §150.....	11
N.Y.C. Executive Order No. 91.....	14

Page

Other Authorities

[1970] U.S. Code Cong. & Ad. News, Pub. L. No. 91-190..... 26

[1975] U.S. Code Cong. & Ad. News, S. Rep. No. 94-52, Pub. L. No. 94-83..... 22

Note, "The Environmental Impact Statement Requirement in Agency Enforcement Adjudication," 91 Harv. L. Rev. 815 (1978)..... 34

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. _____

PATRICIA ROBERTS HARRIS, Secretary of the Department of Housing and Urban Development, THE CITY OF NEW YORK and STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,

Petitioners,

v.

ROLAND N. KARLEN, ALVIN C. HUDGENS and CONTINUE,

Respondents.

PETITION OF THE CITY OF NEW YORK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner City of New York respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in

this case. The United States Solicitor General, on behalf of petitioner Patricia Roberts Harris, is also filing a petition for writ of certiorari. Petitioner City of New York respectfully relies upon the appendix to the Solicitor General's petition for the texts of the decisions below.

Opinions Below

The opinion of the Court of Appeals sought to be reviewed is reported at 590 F. 2d 39. The opinion of the District Court for the Southern District of New York is reported at 445 F. Supp. 204.

The decision of the Second Circuit Court of Appeals rendered upon the first appeal of this case, sub nom Trinity Episcopal School Corporation v. Romney, is reported at 523 F. 2d 88, and the initial District Court decision of the Southern District of New York is reported at 387 F. Supp. 1044.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered December 14, 1978. A timely motion for rehearing en banc was denied on March 15, 1979. An enlargement of time to file this petition for writ of certiorari to and including August 3, 1979 was granted to this petitioner by Justice Marshall by order dated July 5, 1979. A copy of that order appears as an appendix

hereto. This petition was filed within the time granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 et seq., provide a substantive criterion for agency evaluation of the environmental effects of federal actions that restricts the exercise of administrative discretion and prohibits consideration of delay as a significant factor in choosing among comparable alternatives?

2. Does NEPA prohibit the administrative agency from authorizing a project which has been evaluated in a special environmental clearance as acceptable in other respects but which is likely to result in "economic concentration"?

Statement of the Case

The instant litigation arises out of the determination of the Department of Housing and Urban Development ("HUD") to fund the construction of a low-income housing project upon Site 30 located within the West Side Urban Renewal Area of New York City. The suit was commenced on October 4, 1971 in the District Court for the Southern District of New York. The early history of the case and the issues initially raised by the plaintiffs are thoroughly set forth in the first opinion of District Court Judge Irving Ben Cooper rendered following a lengthy trial, on November 15, 1974 (63a et seq.).*

*Numbers in parentheses refer to pages of the appendix to the Petition of Patricia Roberts Harris unless otherwise noted.

Judge Cooper rejected all of the plaintiffs' allegations as unsupported by the evidence. He found plaintiffs' breach of contract claims to be totally without merit (88a-96a), and similarly rejected allegations that the proposed low-income housing project to be built on Site 30 would "tip" the racial and/or economic and/or social balance of the neighborhood, concluding that plaintiffs had not sustained their burden of proof on this point (116a, 119a). Judge Cooper analyzed the sufficiency of HUD's site selection criteria study prepared pursuant to 24 C.F.R., Part 200, Subpart N, and concluded that the applicable standards had been met and that plaintiffs' challenge had not been adequately supported with "convincing" evidence (124a-135a).

In response to plaintiffs' contention that HUD's funding of the project was fatally defective by virtue of HUD's failure to comply with the procedure provided under NEPA, Judge Cooper determined that no Environmental Impact Statement ("EIS") was required by the terms of the statute and that HUD's special environmental clearance had adequately treated all applicable considerations required under NEPA (120a et seq.) The District Court also held that defendants had substantively complied with the procedural requirements of state and local law in effecting the change in the proposed use of Site 30 to low-income public housing (135a-140a).

The District Court's judgment of November 15, 1974 was appealed to the Second Circuit Court of Appeals. All of Judge Cooper's factual conclusions were

accepted (54a-55a). The case was remanded, however, upon the determination that the District Court had erred in its interpretation of the procedural requirements of NEPA. Although it agreed with Judge Cooper's conclusion that an EIS was not necessary (61a), the Circuit Court held the District Court's findings "1) that consideration of alternatives is necessary only in the context of an EIS and 2) that HUD acceptance of the conclusion of the Housing Authority that, considering the scarcity of available sites and the unmet needs for public housing, there are no alternative sites, fulfilled HUD's duty to consider alternatives . . . as a matter of law fail[ed] properly to articulate or scrutinize HUD's responsibilities as mandated by NEPA" (56a). The Circuit Court based its decision upon the failure of HUD

to consider alternative sites as required pursuant to §102(2)(D) of NEPA (renumbered 102(2)(E))(57a, 62a).

In conformity with the Circuit Court's decision, on September 25, 1975, the District Court entered an injunction prohibiting construction on Site 30 pending HUD's consideration and report of alternatives. On April 25, 1977, HUD filed its report in the District Court (hereinafter, "HUD Report"). On September 21, 1977, petitioners moved to dissolve the injunction and for summary judgment dismissing the complaint on the grounds that the Circuit Court's mandate for consideration of alternatives had been fully complied with and that the ultimate decision had been properly made by HUD in the exercise of its administrative discretion (Joint Appendix at A213-A224).

Plaintiffs opposed the motion arguing that HUD's procedural reliance upon Section 102(2)(C)(iii) of NEPA, instead of Section 102(2)(E) (formerly 102 (D)) as specified by the Circuit Court, failed to comply with the prior order and that remand was required for further consideration (Joint Appendix at A255). Attacking the factual conclusions of the HUD Report, plaintiffs reiterated their claims of "tipping" and accused the government agencies of failing to comply with the Plan for development of the entire area (Joint Appendix at A351 et seq.) Plaintiffs further alleged that the HUD Report failed to comply with the Circuit Court's mandate in that it was prepared without the direct participation of plaintiffs. While demonstrating their considerable written participation in HUD's

review of the project through dozens of letters, plaintiffs complained that no open hearings were conducted, in violation of their right to due process.* Upon the oral argument of the motion, plaintiffs also claimed that petitioner City of New York had failed to comply with the recently-enacted New York State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law, Article 8, §§8-0101 et seq.

Following the submission of additional evidentiary material, on January 19, 1978, Judge Cooper found the Court of Appeals' mandate "clear and explicit" in requiring

*It is noted that open public hearings were held pursuant to Public Housing Law §150 in June, 1971 when the Site 30 conversion to public housing was first proposed (137a).

"HUD to investigate alternatives not from a viewpoint as to how HUD or the City Housing Authority would choose to resolve the City's low-income housing situation, but 'as to how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact'" (14a, 15a). The District Court reviewed each of the arguments presented in opposition to the motions to dissolve the injunction and for summary judgment and concluded: "[W]e find plaintiffs' conclusory assertions to be without merit either in law or fact and, accordingly, we grant the Government's motions" (18a).

Judge Cooper analyzed the HUD Report and the procedures by which it was developed in great detail (18a-38a).

He found that the "inadequacy of police services, which was the subject addressed most often in the responses HUD received from its advertisement, [was] extensively reviewed" (23a), as were all comments received upon the advisability of constructing low-income housing on Site 30. Following the City's evaluation of alternatives, Judge Cooper found that HUD had made its own independent study which included additional alternatives (32a et seq.). The District Court described the HUD Report as "exhaustive" and concluded that it fully satisfied the mandate of the Second Circuit (38a).

Noting that HUD had carefully followed its own regulations in making its Report, Judge Cooper held that HUD's application of NEPA Section 102(2)(C) in lieu of Section

102(2)(D) (now 102(2)(E)) was a "harmless" deviation from the Circuit Court's mandate since both provisions serve the substantive intent of NEPA to require a study of alternatives (38a). Judge Cooper determined that HUD was not required to hold public hearings before preparing its report (45a), and held the instant project to be exempt from the requirements of the N.Y. Environmental Quality Review Act and N.Y.C. Executive Order No. 91 by virtue of its having been undertaken prior to June 1, 1977 (48a). By order dated February 2, 1978, the District Court dissolved the injunction and dismissed the complaint.

On March 20, 1978, plaintiffs moved, pursuant to Rule 60(b), to vacate and annul the order of February 2, 1978 on the grounds that the District Court had

misinterpreted the mandate of the Circuit and had erroneously granted petitioners' motions. In their supporting papers, plaintiffs reiterated their original arguments that the 70-30 ratio was not being maintained, in derogation of the original Plan, and that the Site 30 Project would result in tipping (Joint Appendix at A581-A583). Plaintiffs repeated their prior complaints that the proper procedure under NEPA had not been followed and that they had not been permitted to participate in the preparation of the HUD Report to the degree they desired.

The Site 30 Project was also attacked as being inherently inconsistent with recent local governmental policy changes respecting the general advisability of

high-rise public housing projects (Joint Appendix at A597-A601). The factual allegations cited as supportive of this argument relate to events which took place subsequent to the submission of HUD's Report on the Site 30 Project.

On March 22, 1978, District Court Judge Cooper summarily denied plaintiffs' motion, finding it "unfounded in every particular and an unwarranted imposition on this Court's time and effort" (Joint Appendix at A719-A720).

On December 14, 1978, the Circuit Court of Appeals for the Second Circuit rendered the decision herein sought to be reviewed. In an opinion by Judge Moore, the Circuit Court noted that its prior decision to remand was predicated specifically upon the need for further study of "possible 'alternatives' . . . [to the] development of

Site 30 [as] 100 per cent low-income housing" (3a). Citing to HUD's finding that the City's assessment of alternatives was "incomplete" in that two other sites were considered "more appropriate" for the proposed project, the Circuit Court rejected the agency's decision to retain the Site 30 location which had been based largely upon the extensive continued delay which would be necessitated by the selection of an alternative site and HUD's evaluation that "'[t]he continued inability of government to meet these needs [more low-rent housing for people of low income] would be considered an adverse environmental effect of transfer to another site'" (5a).

The court below criticized the agency determination principally because Site 30 is located on a street already developed with a high concentration of low-income

housing and the court found that such concentration thwarted "the Congressional purpose of racial and economic integration" (10a) and "the integration contemplated by NEPA" (7a). The Court of Appeals expressly held "that delay is an impermissible factor as against a further concentration of low-income housing on West 91st Street" (10a). The injunction against construction of the proposed project on Site 30 was reinstated and the case was again remanded to the District Court (11a).

Reasons For Granting the Writ

Apart from the importance of the particular project at issue to the housing needs of the City of New York, the decision of the Second Circuit Court of Appeals has an even broader and more far-reaching effect upon this petitioner

and other municipalities across the country who must rely upon the judgment and co-operation of federal agencies in meeting the needs of the local population. It is submitted that the decision here is not only incorrect, but brings chaos to the legitimate functioning of the executive branch of government at all levels by subjecting the conscientious, well-reasoned decisions of both local and federal officials to interminable litigation and ultimate frustration. Moreover, the Second Circuit has clearly substituted its own view of the propriety of the instant project for the expert evaluation and determination of the administrative agency in violation of law.

1. THE DECISION BELOW IS INCORRECT AND CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT.

The court below stated that "[t]he provisions of NEPA contain the substantive standards necessary to review the merits of agency decisions under the APA" (7a). While acknowledging that HUD's "careful analysis of the various sites has shown that it has given 'consideration' to alternatives," the Circuit Court noted, "Ultimately there must be a decision and by some decision-maker" (8a). It then proceeded to reject the entire rationale applied by HUD, well-supported in HUD's environmental analysis contained in its special environmental clearance, apparently upon the theory that NEPA creates a substantive standard for review of agency action quite apart from the traditional dictates of the Adminis-

trative Procedure Act, 5 U.S.C. §706, and authorizes the judiciary to review the exercise of federal administrative discretion on the merits irrespective of whether the agency's decision represents a reasonable alternative to the court's own view of the proper course of action.

Such conclusion directly conflicts with and contravenes the recent decision of this Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978), in which this Court stated:

> [I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best"

> or "correct" result, judicial review would be totally unpredictable.*

Reversing the District of Columbia Circuit Court's substitution of its discretion for that of the administrative agency, and quoting from its own earlier decision in Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976), this Court said (435 U.S. at 555):

> [T]he role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.

---

*See also, S. Rep. No. 94-52 regarding Pub. L. Nos. 94-83, 89 Stat. 424, amending 42 U.S.C. §4332, [1975] U.S. Code Cong. & Ad. News 859, 864, in which it is stated that the amendment permitting preparation of an EIS by interested state agencies or officials was necessitated by conflicting court decisions and was intended "to reduce uncertainties created by litigation and the delays resulting from such uncertainties."

> "Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." (citation omitted)

This Court concluded that while NEPA does establish substantive goals, "its mandate to the agencies is essentially procedural" and well-considered agency decisions should not be set aside "simply because the court is unhappy with the result reached" (435 U.S. at 558). See also, Kleppe v. Sierra Club, supra, 427 U.S. at 412.

In addition to dealing with the general purpose and proper application of NEPA, Vermont Yankee speaks specifically to other errors in the decision of the Second Circuit Court of Appeals. For example, this Court noted that agency

consideration and review of the proposed Vermont nuclear power plant had consumed years; it found, contrary to the finding of the Second Circuit Court of Appeals here that delay is not an acceptable consideration in choosing among alternatives (9a-10a), that to nullify seven years of effort because yet another problem, which was in fact considered, has been reported "borders on the Kafkaesque" (435 U.S. at 557). It is noted that the Site 30 project was approved in its present amended form in 1971, almost eight years ago.

The record indicates that the two alternative sites suggested as preferable to Site 30 were only marginally preferable and might well present the same or comparable drawbacks as those associated with Site 30. The Circuit Court acknowledged

that adequate consideration had been given to alternatives and to the environmental problems of building on Site 30(8a). Its rejection of HUD's evaluation was based not on procedural shortcomings, but on the substantive choice HUD made in deciding to approve the Site 30 project rather than further delay construction of badly-needed low-income housing and thus possibly precipitate more serious environmental problems. The Court of Appeals' decision to substitute its judgment for that of HUD under the guise of NEPA compliance was clearly in error and should be corrected by this Court.

Finally, in light of this Court's observation in Vermont Yankee, supra, 435 U.S. at 553-555, that judicial review of administrative decisions will inevitably involve a time lag, often

resulting in substantial changes in policy or circumstances which should not be considered by a reviewing court so as to render the agency determination inappropriate retrospectively if it was reasonable at the time it was made, the suggestion of the court below that recent changes in policy regarding the advisability of high-rise housing generally should be considered upon remand is entirely inappropriate.

The decision of the court below is in complete conflict with the decisions of this Court regarding the proper interpretation and application of NEPA and is unsupported by the language of the statute itself or its legislative history. See generally, Leg. Hist. of Pub. L. No. 91-190, 83 Stat. 853, [1970] U.S. Code Cong. & Ad. News 2751 et seq.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF NEPA.

In addition to the clear conflict between the decisions of this Court and that of the Second Circuit Court of Appeals as heretofore noted, the decision at issue represents a substantial conflict both within the Second Circuit and among the other circuit courts of appeals as to the substantive requirements of NEPA and the appropriate standard of judicial review of agency actions under NEPA.

In County of Suffolk v. Secretary of the Interior, 562 F. 2d 1368 (2d Cir., 1977), cert. den., 434 U.S. 1064 (1978), decided in the Second Circuit by a panel consisting of Judges Mansfield, Smith and Palmieri, none of whom participated in rendering the decision sought to be

reviewed by this Court,* the decision of the District Court to void gas and oil exploration leases based upon an alleged inadequacy in the Environmental Impact Statement prepared pursuant to NEPA was reversed. In that case, the Second Circuit Court of Appeals criticized the District Court for having "allowed its views regarding the substance of the Secretary's proposal to becloud its understanding of its reviewing function and its analysis of the Sale 40 EIS for adequacy" (562 F. 2d at 1390), and for "substitut[ing] the court's judgment for that of the Department

*Judge Mansfield was, however, a member of the circuit panel that initially remanded this case for consideration of possible alternatives. Trinity Episcopal School Corporation v. Romney, supra, 523 F. 2d 88 (2d Cir., 1975). He was replaced by Judge Mulligan in the instant appeal, Judges Moore and Gurfein having sat upon both appellate panels.

and its experts, exceeding the proper scope of judicial review" (562 at 1386). The court in Suffolk unequivocally held that the ultimate decision-making authority to weigh and balance the competing interests involved in the performance of executive functions rests with the administrative official (562 F. 2d at 1389). Such analysis clearly conflicts with the decision at bar in which the court determined, entirely upon its own prerogatives, that delay in construction and the attendant prolongation of the government's failure to meet an urgent need for more low-rent housing in the City of New York could never justify a compromise which would result in economic concentration (10a).

A similar conflict in NEPA construction and application is evidenced by decisions in

other circuits. In Commonwealth of Massachusetts v. Andrus, 594 F. 2d 872, 892 (1st Cir., 1979), the First Circuit Court of Appeals, noting that the weighing of competing interests and the ultimate responsibility to decide are vested in the agency, held that the Administrative Procedure Act, 5 U.S.C. § 706, limits judicial review under NEPA so that "[s]o long as the Secretary's determinations are within the law, are based upon consideration of the relevant factors, and do not involve clear errors of judgment, a court may not substitute its view" (594 F. 2d at 888). The same Circuit Court ruled in New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Commission, 582 F. 2d 87, 95 (1st Cir., 1978), quoting from this Court's opinion in Kleppe v. Sierra Club, supra, 427 U.S. at 410 n. 21:

> [T]he requirement for thorough study [imposed by NEPA] does not determine the result of the comparison. The ultimate decision is left to the discretion of the the agency. "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.... The only role for a court is to insure that the agency has taken a 'hard look' at the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the, choice of the action to be taken'."

The Ninth Circuit Court of Appeals has repeatedly stated its position that "NEPA is essentially a procedural act" which does not require a review of the agency's decision on the merits. "The project when finished may be a complete blunder -- NEPA insists that it be a knowledgeable blunder." Matsumoto v. Brinegar, 568 F. 2d 1289, 1290 (9th Cir., 1978).

NEPA does not require, and the APA does not permit the courts to analyze the relative merit of the decision-maker's findings unless they are clearly erroneous, arbitrary or capricious. The only issue properly before the courts is whether there has been procedural compliance with NEPA and adequate disclosure and consideration of environmental consequences. See, Matsumoto v. Brinegar, supra, and Warm Springs Dam Task Force v. Gribble, 565 F. 2d 549, 551-552, 554 (9th Cir., 1977) and cases cited therein; accord, Sierra Club v. Adams, 578 F. 2d 389, 395-397 (D.C. Cir., 1978); National Helium Corp. v. Morton, 486 F. 2d 995, 1002-1003, 1006 (Breitenstein concurring) (10th Cir., 1973).

Finally, contrary to the instant ruling of the Court of Appeals that the consequences of delay are "impermissible"

factors to be considered in the decision-making process under NEPA (10a), the District of Columbia Circuit Court of Appeals has expressly held that the Secretary of the Interior had the discretion to reject the advice of EPA, CEQ and others to further delay action and to act upon his own determination that the adverse consequences of delay outweighed the potential benefits to be derived therefrom. State of Alaska v. Andrus, 580 F. 2d 465, 474 (D.C. Cir.), vacated in part and remanded sub nom Western Oil & Gas Assoc. v. Alaska, 58 L. Ed. 2d 315 (1978). The Court there stated (at 473-474):

> Where that cost [of proceeding without more and better information] has been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further

> delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought. [citation omitted].

It has been recognized that the question of the substantive reach of NEPA has been the subject of "extensive judicial and scholarly debate." Note, "The Environmental Impact Statement Requirement in Agency Enforcement Adjudication", 91 Harv. L. Rev. 815, 828 (1978). The decisions heretofore cited, when contrasted with that at bar, evidence a serious dichotomy in the rationale applied in the interpretation of NEPA in the various circuits. The need for consistency and efficiency in the administration of federal programs of all kinds requires that this Court articulate a precise standard by which NEPA compliance may be tested and

set forth the proper scope of judicial review of substantive decision-making under NEPA.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

August 2, 1979

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
for Petitioner City of
New York,
100 Church Street
New York, N.Y. 10007

L. KEVIN SHERIDAN,
LEONARD KOERNER,
CAROLYN E. DEMAREST,
of Counsel.

Supreme Court of the United States

No. A-1071

CITY OF NEW YORK,

Petitioner,

v.

ROLAND N. KARLEN,
ET AL.

FURTHER
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, FURTHER extended to and including August 3, 19 79

/s/ Thurgood Marshall
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of July, 19 79

see

7 9

1 6 8

1 8 4